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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

BEN G. MILTON, dba SERVICE CHECK COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ben G. Milton, your petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit, entered in this case on September 15, 1967 (p. 17, *infra*), Rehearing denied on October 11, 1967 (p. 19, *infra*).

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio is reported at 253 F. Supp. 89 (p. 9, *infra*). The opinion of the Court of Appeals is reported at 382 F. 2d 976 (p. 17, *infra*).

JURISDICTION.

The judgment of the Court of Appeals made on September 15, 1967, and finalized on October 11, 1967, when the Rehearing was denied. Copies thereof are appended to this Petition (see 17-19, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether the Government, as a judgment creditor, can insert its name as payee on blank money orders, which had been seized from a judgment debtor, and by virtue of such action acquire rights superior to those of the seller of such money orders, who without knowledge of the Government's possession or lien, at the request of the original purchaser stopped payment thereon and made a refund to such purchaser?

STATUTES INVOLVED.

The relevant statutes are set forth in the appendix, pp. 19-25, *infra*, as follows: Internal Revenue Code of 1954, Sections 6311, 6321, 6331; Ohio Revised Code Sections 1301.59, 1301.60, 1301.86, 1303.34, 1310.01, 2715.20, 2715.24 and 2715.33.

STATEMENT OF CASE.

This action was submitted to the court on stipulations of facts which stipulations were adopted by the court and incorporated in its findings of fact and can be found in the appendix attached hereto (pp. 9-11).

The United States of America brought this action as the holder of the following *money orders* issued by the petitioner and drawn upon the First National Bank of Akron, Ohio:

Date of Instrument	*Serial No.*	*Amount*
5/20/61	206758	$1,000.00
5/20/61	206759	1,000.00
5/20/61	206760	1,000.00
5/20/61	206761	1,000,00
5/20/61	206762	800.00
5/13/61	197241	1,000.00
5/13/61	197242	1,000.00
5/13/61	197246	500.00
		$7,300.00

The petitioner, licensed by the State of Ohio to sell money orders to the public, sold the above money orders to one Shondor Birns on the dates set forth therein. These money orders were sold and delivered to Birns in Akron, Ohio, where the petitioner resides and does business. The name of the payee was left blank and Birns was given authority by the petitioner to fill in the name of the payee. On May 24, 1961, Birns was taken into custody by the Cleveland Police; these money orders, which were in his possession, were removed from his person by the police who notified the Government of the existence of these money orders.

The United States of America, having in its favor an unpaid judgment against Birns in the United States District Court for the Northern District of Ohio, Eastern Division, for taxes, on May 24, 1961, co-signed a writ of execution issued by the District Court to be served upon the Chief of the Cleveland Police Department, who turned over the instruments to the United States Marshal pursuant thereto.

On the day Birns was released from custody, without any charges having been placed against him, he prevailed upon the Petitioner to issue stop payment orders against these money orders. Still later, on May 26, 1961, after determining that the instruments had not been presented and paid, the Petitioner returned the $7,300.00 to Birns. It was subsequent to this transaction that the Internal Revenue Service was entered as payee on the money orders. And it was still later, in fact ten days after the refund to Birns cancelled the antecedent transaction, that these money orders were presented for payment to the drawee bank. The bank, of course, on the basis of the stop payment order, refused to honor them. Significant here the tax lien, in excess of $7,300.00, against Birns was on file in Cuyahoga County, Ohio, where Birns resided. No such lien was filed with the recorder of Summit County, Ohio,

where Petitioner conducted his affairs and where the money orders were purchased and cancelled.

This action was then commenced by the Government, in the District Court, to recover the money orders from the Petitioner. Judgment was rendered for the Government on February 24, 1966, from which judgment an appeal was taken to the Court of Appeals, which affirmed.

ARGUMENT.

The Government Not Having Received Certain Money Orders, in Which the Payee Was Left Blank, by Negotiation Did Not Have Authority to Insert Its Name as Payee.

It is submitted *first* that, under the facts of this case, the State law required the Government following its seizure of the money orders to garnish or attach the debt (if there was a debt as between petitioner and the Government's judgment creditor—the purchaser of these money orders). See *Finnell v. Burt,* 12 Ohio Dec., Reprint 403; *Owen v. Miller,* 10 Ohio St. 136. That the Government was required to comply with the "practice and procedure of the State" of Ohio could not be clearer. For in this regard Rule 29, Federal Rules of Civil Procedure, so far as is pertinent, here provides that:

> "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

Also significant here, under State law, as held in the case cited above demonstrates.

> "There can, * * *, be no doubt, if a debtor pays the debt to the defendant in attachment, or obtains a set-off against it, at any time before he is served with a notice, he would be discharged from the liability in the one case, and be protected in right of set-off in the other."

Of course, it is likewise of importance to note that in this case the U. S. Marshal was not appointed as a receiver by the Court, as is required by R. C. of Ohio, Section 2715.21, to take possession of these money orders. This state procedure to the contrary notwithstanding, the Government claims that, by the mere insertion of its name as payee, it thereby acquired rights comparable to those that could have, or would have been acquired, had their possession been obtained by negotiation. Petitioner contends, that as against him, the Government's rights (whatever they were) could not possibly have been effective prior to petitioner's notice of Government's interest. Stated another way, since the Government did not acquire these money orders by negotiation,* it seems most unlikely, under the state law applicable here, that on these same facts a state court could have deemed the Government's position well taken.

In this regard the court's attention is diverted to the case of *Burke v. Jenkins*, 128 Ohio St. 86. In *Burke*, the Ohio Supreme Court held that a payee, whose name was inserted without the authority of the maker, could not recover from the maker although the payee actually paid the maker the money. The Court in specifically com-

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* R. C. of Ohio, Section 1301.32 defines negotiations as follows:

> "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by the indorsement of the holder completed by delivery."

menting on this situation ruled (in a syllabus) to the opinion that:

> "Under section 8119, General Code [now Ohio Revised Code section 1301.16] when a negotiable promissory note is signed by a party as maker, and the name of the payee is left blank, the delivery of such negotiable promissory note gives to the person in possession thereof *prima facie* authority to fill in the name of the payee. In order, however, that such an instrument, when completed, may be enforced against the maker who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time."

The Court of Appeals, while apparently conceding the efficacy of the *Burke* decision, would distinguish this case on the theory that in *Burke* "the maker had intended that a specific payee be named" (*United States v. Milton*, 382 F. 2d, at 977), and it was from this premise that the court concluded that petitioner "did not require that the name of any particular person be filled in as payee * * * [and that since] the United States was in possession of the money orders and was named as payee, it was a holder under the law of Ohio then applicable" (*id.* at 977-978).

But this conclusion, by the appeals court really begs the question that was necessary for decision. That question, simply put, required a resolution of the following queries (1) did the Government acquire rights superior to Birns and (2) did the Government's acquisition of these money orders so bar Birns from stopping payment, a right he doubtless would have had the Government not seized the money orders, as to make this petitioner liable for having made the routine, good faith refund to Birns.

So phrased it is submitted that the Court of Appeals misapplied the controlling state law when it resolved this case on the tenet, expressed in the opinion, that "Regard-

less of * * * [petitioner's] power to stop the First National Bank of Akron from paying the United States, he was obligated to make such payment unless he had available a defense good against the holder" (*id.* at 978). This is so because the essential question must be, as phrased above, whether Birns had the power upon sufficient representations to cause the stop payment order to be issued, and whether this petitioner, who in good faith relied on these representations, should be penalized for having done so.

While it may very well be, as the District Court found that "there is a split of authority as to whether payment on a draft drawn by one bank on another can be stopped," in the absence of a clearer prohibition against this being done, it seems unduly harsh either to say, under the peculiar facts of this case, such ability did not exist, and worse yet, that having acted on the basis that such power existed the interpretation voiding such power should be preferred.

The full effect of the Circuit Court's decision is that it permits the U. S. Marshal, when he is the executing officer, to turn property seized over to the judgment creditor for disposition. Thus, in the 6th Circuit, it is now the law at least insofar as the Northern and Southern Districts of Ohio are concerned, that the United States Marshal may seize General Motors stock or even an automobile and turn the item over to the judgment creditor for disposition. Such is not the law of Ohio, nor of any other jurisdiction that we know of, and we doubt that this Court seriously intended to take that position.

Certainly the fact that the executing officer was the United States Marshal, and the judgment creditor the Internal Revenue Service, an Agency of the United States government, should not distinguish the case from other executions.

It is elementary that a negotiable instrument is merely evidence of indebtedness, *Owen v. Miller, supra*; and, in Ohio, under the law that controls in this case, the proper method of execution must be through garnishment of the debt and not by seizure (as was done here) of the instrument. See *Finnell v. Burt,* and *Owen v. Miller, supra.* If this then is a correct analysis of the State law, the law deemed controlling in the Courts below, then surely grounds for the intervention of this Court is required. Otherwise, the device created by the District Court's Opinion, which has been approved by the Court of Appeals could be exploited into a method for the confiscation of property without resort to established procedures.

CONCLUSION.

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued under seal of this Court directed to the United States Court of Appeals for the Sixth Circuit to the end that their judgment may be reviewed and reversed.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioner.

APPENDIX.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed February 23, 1966.)

KALBFLEISCH, *J.*

This case came on for trial upon the pleadings. The case was submitted upon a stipulation of facts prepared and filed by the parties, and the Court adopts said stipulation as its findings of fact, as follows:

(1) The defendant, Ben G. Milton d/b/a Service Check Company, is an individual licensed to do business by the State of Ohio pursuant to Chapter 1310 of the Revised Code of Ohio, including the right to the issuance and sale of money orders to the public, with its principal place of business at 989 East Market Street, Akron, Summit County, Ohio.

(2) In such capacity, the defendant in Summit County sold money orders to one Alex S. Birns, true copies of which are attached to the complaint filed herein. Said money orders at the time sold to Mr. Birns were blank as to the name of any payee and the purchaser, Mr. Birns, was authorized by the defendant to fill in the name of such payee as he should designate on each.

(3) On May 24, 1961, the said Alex S. Birns, the purchaser of the money orders from the defendant, was taken into custody by the Police Department of Cleveland, Ohio, in Cuyahoga County, and the said money orders in the face amount of Seven Thousand Three Hundred Dollars ($7,300.00), which were blank as to any payee, which were in his possession, were taken from him by members of the Cleveland Police Department and held by them in accordance with the practice of the Cleveland Police Department regarding property of persons held in custody.

(4) Approximately three (3) years prior to this date of May 24, 1961, a judgment had been entered against one Alex S. Birns, the same Birns who had purchased the said money orders from the defendant, in favor of the United States of America by the United States District Court, Northern District of Ohio, Eastern Division, Civil Case No. 34454, on August 6, 1958, for One Hundred Forty-Six Thousand Ninety-Nine and 39/100 Dollars ($146,099.39). Said judgment was not fully paid on May 24, 1961, and is still unpaid.

(5) On the said May 24, 1961, the United States Attorney filed a Praecipe for a Writ of Execution with the Clerk of the United States District Court to attach the property of the said Alex S. Birns, which were being held by the Police Department.

(6) On the same May 24, 1961, a Deputy United States Marshal proceeded to the Cleveland Police Department and served the Chief of Police with a copy of the Writ of Execution, and pursuant thereto the Chief of Police delivered the said money orders in the face amount of Seven Thousand Three Hundred Dollars ($7,300.00), which were blank as to the payee, to the Deputy United States Marshal in the presence of Alex S. Birns but without his consent. A return was made on the Writ of Execution by the Deputy United States Marshal and the money orders were delivered to the plaintiff, the United States of America.

(7) On the same day, May 24, 1961, Alex S. Birns was released from custody without charges placed against him, and he immediately issued stop-payment orders as to the said money orders to the defendant and to the drawee bank, First National Bank of Akron, in Summit County, Ohio.

(8) On May 26, 1961, two days later, no money orders having been presented for payment to the defendant or the drawee bank, the defendant, in his office at 989 East Market Street, Akron, Ohio, returned to Alex S. Birns the sum of Seven Thousand Three Hundred Dollars ($7,300.00), being the face sum paid by Birns for the same.

(9) The Internal Revenue Service subsequently entered its own name on the money orders as payee.

(10) On June 5, 1961, approximately ten days later, the United States of America presented said money orders to the drawee bank, First National Bank of Akron, Summit County, Ohio, where payment was refused and the plaintiff notified of the May 26, 1961 stop-payment order thereon, and the said money orders were dishonored.

(11) Demand was then made by the plaintiff upon the defendant and the defendant refused and still refuses to honor said instruments.

(12) During all times pertinent herein, a tax lien existed in favor of the United States of America, the plaintiff, for an amount in excess of Seven Thousand Three Hundred Dollars ($7,300.00) against all property of the said Alex S. Birns, said lien being duly filed with the Recorder of Cuyahoga County, Ohio.

(13) No lien was ever on file in Summit County, Ohio.

(14) The plaintiff, United States of America, now seeks to recover the value of said money orders from the defendant, Ben G. Milton d/b/a Service Check Company, of 989 East Market Street, Akron, Summit County, Ohio.

(15) On the 26th day of May, 1961, Alex S. Birns was a resident of Cuyahoga County and domiciled in the said County in the State of Ohio.

CONCLUSIONS OF LAW.

The money orders involved herein were instruments issued under the authority of Section 1310.01 of the Ohio Revised Code. Each of these money orders was issued by the defendant and directed to the First National Bank of Akron, Ohio, and each money order evidenced the fact that a payee (unnamed) may demand and receive, upon endorsement and presentation to the bank, the amount stated on the face of the money order. *State ex rel. Babcock v. Perkins,* 165 Ohio St. 185, 187.

Preliminarily, it is necessary to emphasize that the money orders are "property" or "rights to property" within the meaning of Title 26 U. S. C. A., Section 6321.

Incident to Mr. Birns' being taken into custody by the Cleveland Police the money orders were found to be in his possession. The United States Marshal seized the money orders under an execution in Civil Case No. 34454 in this Court. Taking judicial notice of Civil Case No. 34454, the record reveals that the judgment arose from an assessment against Mr. Birns for failure to pay income taxes and that in addition to the aforementioned judgment a lien for the unpaid income taxes, which were the basis of said case, was in existence in favor of the plaintiff for an amount in excess of the face amount of the money orders, said lien having been duly filed with the Recorder of Cuyahoga County.

On November 8, 1963, Judge Green of this Court wrote a searching and thorough memorandum concerning the application and effect of the judgment in Civil Case No. 34454 and also the lien of the plaintiff under Title 26 U. S. C. A., Sections 6321 and 6331. Although his memorandum dealt with the seizure of an automobile, which because of its nature lent itself to public sale in the market place, his analysis of the scope and reach of the liens is

equally applicable to the defendant's obligation to pay the money orders.

The United States Marshal, having properly and legally seized the money orders, was not only authorized but required under the law to deliver them to the plaintiff upon demand. *Simpson v. Thomas,* 271 F. 2d 450. It is significant to note that *Simpson, supra,* not only authorized the Marshal to deliver the money orders to the plaintiff but also held, at page 452:

> "When a tax lien attaches to property, the United States becomes in a sense a co-owner with the taxpayer of the property to the extent of the lien. The taxpayer then ceases to have an unconditional right to obtain or retain possession of the property. The substantive rights of the United States and of the taxpayer are in no sense dependent upon the nature of the immediate custody of the property or the identity of the custodian."

See also Section 6321, Title 26 U. S. C. A.; and *United States v. City of Greenville,* 118 F. 2d 963. In *Greenville,* at page 965, the Court stated:

> "After the lien provided by the statute attaches, the property has in a sense two owners, the taxpayer and, to the extent of the lien, the United States. Com'r. v. Coward, 3 Cir., 110 F. 2d 725, 727."

See also *Welsh v. United States,* 220 F. 2d 200.

The existence of the tax lien signifies that notice and demand had been made upon Birns and that he refused to pay the lien, and the levying of the execution and the seizure of the money orders in the presence of Birns and without his consent, as was stipulated, are tantamount to a levy and distraint as provided in Section 6331, Title 26 U. S. C. A.

The seizure of the money orders by the United States Marshal under the writ of execution and, thereafter, the

levying of the United States upon said money orders in the custody of the Marshal fall squarely within the holding of *United States v. Sullivan,* 333 F. 2d 100, wherein the Court stated, at page 116:

> "Levy is a summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims. See Bull v. United States, 295 U. S. 247, 259-260, 55 S. Ct. 695, 75 L. Ed. 1421 (1935). See also New Hampshire Fire Ins. Co. v. Scanlon, 362 U. S. 404, 407-408, 80 S. Ct. 243, 4 L. Ed. 2d 826 (1960). Statutory levy is substantially broader in scope than anything known to the common law, and it is applicable to intangible as well as to tangible property. See Glass City Bank of Jeanette, Pa. v. United States, supra. When validity invoked, it effects a seizure of the delinquent's property tantamount to a transferal of ownership. See United States v. Eiland, 223 F. 2d 118, 121 (4 Cir. 1955)."

The defendant herein deliberately and knowingly omitted and left blank the name of a payee on the money orders, and deliberately and knowingly sold and delivered such money orders to the taxpayer unconditionally, that is, without any limitation as to a particular purpose or as to any condition precedent to presentment and payment to a bona fide holder in possession.

> "It was a well-settled rule of the law merchant that if a person affixed his signature to a negotiable instrument in which there were blanks or omissions, and delivered it to another, the holder thereof had the implied authority to fill the blanks or omissions appearing on the face of the instrument. The Negotiable Instrument Act affirms this rule, declaring that when the instrument is wanting in any material particular, the person in possession thereof has a prima facie

authority to complete it by filling up the blanks therein; that a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. If the blanks are in form to imply authority to fill them, the act of so doing is not fraudulent, or against the maker's consent, but by his authority." 40 *O. Jur.* 2d, Section 161, pp. 129-30.

The plaintiff having acquired possession and virtual ownership of the money orders, in the manner herein described, under the law of the case became a bona fide holder in possession to whom the defendant was obliged to pay the face amount of the money orders upon surrender and presentment. The law of Ohio on this subject is found in the case of *Cross v. The Exchange Bank Co.*, 110 Ohio App. 219. At page 221, the Court stated:

"In the purchase from a bank of a money order or a cashier's check, payable on its face to one other than the purchaser, the bank is the drawer, and the person named therein as the recipient of the amount specified to be transferred is the payee or drawee. When the purchaser has paid to the bank the consideration specified by it for the execution of the negotiable instrument, and the bank has prepared and delivered to the purchaser the instrument, for delivery to the payee, the contract between the bank and the purchaser of the instrument becomes executed.

"The bank, as drawer, then becomes liable to the payee, drawee or endorsee, for the amount specified in the instrument, upon endorsement, presentation and demand by the payee or endorsee; and the payee or endorsee may demand and receive the amount stated on the face of the instrument, upon endorsement, presentation to and demand upon the bank.

"Under the circumstances set forth in the amended petition, the purchaser had no right to countermand payment by the bank, to the payee or endorsee, in the absence of fraud, failure of consideration, or injunction order prohibiting payment—none of which are here alleged. 9 Corpus Juris Secundum, Banks and Banking, Section 173, supra."

Money orders and cashier's checks being equivalent (*State ex rel. Babcock, supra*), and it having been well settled in law that there is no right to stop payment on a cashier's check, the same rule applies to money orders (107 *A. L. R.*, page 1464).

The incident of the stop-payment order communicated by Birns to the defendant and the First National Bank of Akron was invalid and does not relieve the defendant of the obligation to pay the money orders. The money orders involved herein were simply directed to the First National Bank of Akron and were to be paid from the bank's funds; however, the liability for payment rests solely upon the defendant. See *State ex rel. Babcock, supra.*

Judgment will be entered in favor of the plaintiff and against the defendant in the sum of Seventy-Three Hundred Dollars ($7,300.00) with interest at six per cent (6%) from June 5, 1961 (Ohio Revised Code, Section 1303.21).

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided September 15, 1967.)

Before McCree and Combs, Circuit Judges; and Cecil, Senior Circuit Judge.

Per Curiam. This is an appeal from a decision of the District Court determining that the United States, as holder of money orders issued by appellant in the amount of $7300.00, was entitled to recover this amount from appellant. The opinion of the District Court, reported at 253 F. Supp. 89, recites the facts as stipulated by the parties and therefore we do not repeat them here.

Appellant claims that the United States failed to follow Ohio procedures in perfecting its lien on the money orders and unauthorizedly named itself payee, and therefore cannot be regarded as a holder of the instruments. Further, appellant contends that he properly stopped payment of the money orders. Finally, he contends that the return of $7300.00 to Birns constituted payment of the money orders, and therefore serves as a defense to the claim of the United States.

For the reasons stated in the District Court's conclusions of law, we find that the United States was properly in possession of the money orders and that it had authority to name the payee. *Burke v. Jenkins,* 128 O.S. 86 (1934) and *Hartington National Bank v. Breslin,* 85 Neb. 47 (1910), the two cases cited by appellant in support of the proposition that a negotiable instrument can be enforced against the maker or drawer thereof only if blanks are filled in strict accordance with the authority given, are distinguishable from the instant case. In both those cases, the maker of the instrument had intended that a specific payee be named. In this case, appellant did not require that the name of any particular person be filled in as

payee. Since the United States was in possession of the money orders and was named therein as payee, it was a holder under the Ohio law then applicable. O. R. C. § 1301.01(H).

The District Court held that appellant had no right to stop payment on the money orders, and that his attempt to stop payment could therefore not defeat the claim of the United States. As appellant points out, it is the general rule that a cashier's check or money order drawn by a bank upon its own funds cannot be stopped, but there is a split of authority as to whether payment on a draft drawn by one bank upon another can be stopped. 107 A. L. R. 1463. The money orders in the instant case were drawn by appellant upon the First National Bank of Akron, and appellant argues that payment could therefore be stopped. It must be recognized, however, that the question of whether a drawer can stop a drawee from paying an instrument is distinct from the question of whether the drawer can avoid his own obligation under the instrument. *See International Firearms Co., Ltd. v. Kingston Trust Co.*, 6 N. Y. 2d 406 (1959); 107 A. L. R. 1463, 1467. Regardless of appellant's power to stop the First National Bank of Akron from paying the United States, he was obligated to make such payment unless he had available a defense good against a holder. *See Cross v. Exchange Bank*, 110 O. App. 219 (1958); O. R. C. § 1301.64.

Appellant suggests that he does have a defense against the claim of the United States, namely, that in returning $7300 to Birns he paid the money orders and thereby discharged his obligation. Birns, however, was not the holder of the money orders at the time this payment was made, and the payment of this money could therefore not discharge appellant's obligation. O. R. C. §§ 1301.34, 1301.86.

The judgment of the District Court is affirmed.

ORDER OF THE UNITED STATES COURT OF APPEALS DENYING REHEARING.

(Entered October 11, 1967.)

BEFORE: McCREE and COMBS, Circuit Judges, and CECIL, Senior Circuit Judge.

Upon consideration, it is ORDERED that appellant's petition for rehearing in the above-named case be, and hereby is, denied.

Entered by order of the court.

CARL W. REUSS,
Clerk.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

Internal Revenue Code of 1954:

Sec. 6311. Payment by Check or Money Order.

* * * * *

(b) *Check or Money Order Unpaid.*—

(1) *Ultimate liability.*—If a check or money order so received is not duly paid, the person by whom such check or money order has been tendered shall remain liable for the payment of the tax or for the stamps, and for all legal penalties and additions, to the same extent as if such check or money order had not been tendered.

(2) *Liability of banks and others.*—If any certified, treasurer's, or cashier's check or any money order so received is not duly paid, the United States shall, in

addition to its right to exact payment from the party originally indebted therefor, have a lien for the amount of such check upon all the assets of the bank or trust company on which drawn or for the amount of such money order upon all the assets of the issuer thereof; and such amount shall be paid out of such assets in preference to any other claims whatsoever against such bank or issuer except the necessary costs and expenses of administration and the reimbursement of the United States for the amount expended in the redemption of the circulating notes of such bank.

(26 U. S. C. 1964 ed., Sec. 6311.)

Sec. 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1964 ed., Sec. 6321.)

Sec. 6331. Levy and Distraint.

(a) [as amended by Sec. 104, Federal Tax Lien Act of 1966, P. L. 89-719, 80 Stat. 1125] *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to

such person or on which there is a lien provided in this chapter for the payment of such tax. A levy shall extend only to property possessed and obligations existing at the time thereof. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employee (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and Sale of Property.—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

(26 U. S. C. 1964 ed., Sec. 6331.)

13 Pages's Ohio Revised Code Annotated:

§ 1301.59 Rights of holder in due course.

A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for its full amount against all parties liable thereon.

§ 1301.60 When subject to original defenses.

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such former holder.

§ 1301.86 Payment in due course.

Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

§ 1303.34 [How instrument discharged.]

An instrument is discharged:

(A) By payment in due course by or on behalf of the principal debtor;

(B) By payment in due course by the party accommodated, when the instrument is made or accepted for accommodation;

(C) By its intentional cancellation by the holder;

(D) By any other act which discharges a simple contract for the payment of money;

(E) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ 1310.01 Capital required to engage in business; bonds; agents; annual fees; revocation of authority to engage in business.

(A) As used in this section the word "person" shall mean any individual, firm, association, partnership, joint stock association, or corporation.

(B) No person shall engage in the business of selling written instruments for the transmission of money or credit unless such instruments are designated, advertised and sold as money orders or travelers' checks and unless its capital is at least one hundred thousand dollars and it has deposited with the treasurer of the state two hundred thousand dollars in cash or securities enumerated in section 1107.03 of the Revised Code. A surety bond in the sum of two hundred thousand dollars in form satisfactory to and issued by a surety company acceptable to the treasurer of the state, may be delivered to the treasurer of the state in lieu of such deposit. Such deposit or bond shall be for the protection of purchasers or holders of money orders or travelers' checks sold by such person. Any aggrieved party may bring a suit to recover from such deposit or bond in any county in which such person has an agent and service may be made upon any such agent.

(C) On or before the fifteenth day of January in each year every person transacting or intending to transact such business shall file with the secretary of state of this state a certificate setting forth the name and business address of every agent authorized to receive money and transact such business on behalf of such person. Each person specified in such certificate shall be the designated agent of the person making the certificate for all purposes connected with the transaction of such business until notice of the termination of such agency is filed with the

secretary of state. A supplemental certificate setting forth any changes in the list of agents contained in such certificate shall be filed with the secretary of state on or before the fifteenth day of April, July and October of each year.

(D). The person filing the certificate required in division (C) of this section shall simultaneously pay to the secretary of state an annual fee of one hundred dollars plus three dollars for every agent listed in such certificate. An additional three dollars shall be added to the annual fee for each additional agent listed in a quarterly supplemental certificate payable simultaneously with the filing of such supplemental certificate. The maximum annual fee payable by any person under this division (D) shall be five hundred dollars.

(E) The secretary of state may revoke the authority of any person to engage in such business because of failure to comply with the provisions of this section. The secretary of state shall revoke the authority of any person to engage in such business in the event any money order or travelers' check issued by such person pursuant to this section is not paid upon presentation.

(F) This section shall not apply to banks, building and loan associations incorporated under the laws of Ohio, federal savings and loan associations or telegraph companies, nor to the receipt of money for the purpose of transmitting it to foreign countries by a person qualified to do so under the provisions of section 1115.16 of the Revised Code.

27 Pages's Ohio Revised Code Annotated:

§ 2715.20 Receiver may be appointed.

On application of the plaintiff, and for good cause shown, the court, or a judge thereof in vacation, may appoint a receiver, who shall take an oath and give a bond as is provided in other cases.

§ 2715.24 Officer to act as receiver.

When a receiver is not appointed as provided in section 2715.20 of the Revised Code, the officer who attaches the property shall have the powers and perform the duties of a receiver appointed by the court, and, if necessary, as such officer may commence and maintain actions in his own name. He also may be required to give security other than his official bond.

§ 2715.33 Action against the garnishee.

If the garnishee fails to appear and answer as required by section 2715.29 of the Revised Code, or if he appears and answers and his disclosure is not satisfactory to the plaintiff, or if he fails to comply with the order of the court to deliver the property and pay the money owing into court, or to give the bond required in section 2715.32 of the Revised Code, the plaintiff may proceed against him by civil action. Thereupon such proceedings may be had as in other actions. Judgment may be rendered in favor of the plaintiff for the amount of property and credits of the defendant in possession of the garnishee, for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1000

BEN G. MILTON D/B/A SERVICE CHECK COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question here is whether the issuer who sold money orders to a delinquent taxpayer is liable to the United States for the amount of such money orders, which it repaid to the taxpayer after the United States had seized the money orders in execution of a tax judgment and levy.

On August 6, 1958, the United States District Court for the Northern District of Ohio adjudged that Alex Shondor Birns owed $146,099.39 in unpaid income taxes. Before May 1961, a tax lien against Birns for an amount in excess of $7,300 was filed with the recorder of Cuyahoga County, Ohio, where Birns resided. (R. 8a–9a, 10a, 11a.) [1]

[1] "R." refers to the Appendix to petitioner's brief in the court of appeals.

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Petitioner is licensed to sell money orders to the public in Ohio. His principal place of business is in Akron, Summit County, Ohio. In May 1961, petitioner sold Birns eight money orders, directing the First National Bank of Akron to pay stated amounts totalling $7,300. The name of the payee was left blank on each money order, and Birns was authorized to fill in the payee's name. (R. 3a, 8a, 10a.)

On May 24, 1961, the Cleveland police took Birns into custody. In accordance with their usual practice, they seized the money orders, which were in his possession and still blank as to payee. On the same day, the United States obtained a writ of execution from the District Court for the Northern District of Ohio to attach the property of Birns held by the Cleveland police. Upon the United States' service of the writ on the Chief of Police, the police delivered the money orders to a United States deputy marshal in Birns' presence, but without his consent.

Birns was released from custody that same day. He immediately ordered petitioner and the drawee bank to stop payment. Two days later, on May 26, 1961, petitioner paid $7,300 to Birns.

The Internal Revenue Service subsequently entered its own name on the money orders as payee. On June 5, 1961, it presented them to the drawee bank for payment. The bank refused, notifying the United States of the stop-payment order. The United States then made demand on petitioner, who refused to honor the money orders. (R. 8a, 9a–10a.)

The United States instituted this action to recover the value of the money orders from petitioner. The

district court held (Pet. 9–16) that the United States was entitled to recover, since petitioner had no right to stop payment as against the United States. The court of appeals affirmed. (Pet. 17–18.)

The decision below is correct. There is no conflict in decisions, or any question of general importance. Further review would not be appropriate.

Tax liens extend to "all property and rights to property" of a taxpayer. Section 6321 of the Internal Revenue Code of 1954; *Glass City Bank* v. *United States,* 326 U.S. 265; *United States* v. *Eiland,* 223 F. 2d 118 (C.A. 4). Because the tax lien against Birns was properly on file at the county of his residence, it attached to his intangible assets, such as these money orders, the situs of intangibles being the owner's residence. *Walker* v. *Paramount Engineering Co.,* 353 F. 2d 445, 448 (C.A. 6).

The United States thus validly acquired possession of the money orders from Birns, and succeeded to his interest in them. *United States* v. *Sullivan,* 333 F. 2d 100, 116 (C.A. 3); *United States* v. *Eiland, supra.* The United States could then name itself payee,[2] and thereby become a *bona fide* holder under the Ohio law then applicable. Ohio Revised Code, Section 1301.01(T), *Stowe* v. *Branigan,* 28 Ohio L. Rep. 278, 7 Ohio L. Abs. 7 (App.); *O'Rourke* v. *Rock,* 29 Ohio L. Abs. 10 (App.).

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[2] *Burke* v. *Jenkins,* 128 Ohio St. 86, is not, as petitioner argues (Pet. 5), to the contrary. There, as the court of appeals noted (Pet. 17), the maker of the instrument had intended that a specific payee be named.

There is no merit to the argument (Pet. 5) that Ohio law requires the United States to employ a receiver to execute its judgment on intangibles. Federal and not State law controls; the seizure was authorized by Section 6331 of the Internal Revenue Code of 1954. *Hoye* v. *United States,* 277 F. 2d 116, 119 (C.A. 9); *United States* v. *Bowery Savings Bank,* 297 F. 2d 380 (C.A. 2). In any event, the appointment of a receiver under Section 2715.20 of the Ohio Revised Code, on which petitioner relies (Pet. 5, 25), is permissive rather than mandatory.

Nor is it material that petitioner claims (Pet. 7–8) he in good faith relied on Birns' alleged power to stop payment on bank money orders. There is no right to stop payment on money orders in the absence of fraud or failure of consideration, except by injunctive proceeding, see *Cross* v. *Exchange Bank,* 110 Ohio App. 219, 168 N.E. 2d 910, even though the holder is not a holder in due course, see *International Firearms Co., Ltd.* v. *Kingston Trust Co.,* 6 N.Y. 2d 406, 411, 160 N.E. 2d 656, 658; *Johnson* v. *First State Bank,* 144 Minn. 363, 366, 175 N.W. 612, 613; and *Kohler* v. *First Nat. Bank of Tonasket,* 157 Wash. 417, 422–423, 289 Pac. 47, 49.[3] Moreover, Section 6311(b)(2) of the Internal Revenue Code provides that when a money order tendered in payment of taxes "is not duly paid, the United States shall * * * have a lien

[3] Cases seemingly to the contrary involved special circumstances such as notification that there was no consideration to support the bank draft. See *Mo. Pac. R. Co.* v. *No. Ark. Highway Improv. Dist.,* 168 Ark. 141, 269 S.W. 569.

* * * for the amount of such money order upon all the assets of the issuer thereof * * *."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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